Chapter 22
Contract Disputes Act (CDA) Claims

2014 Contract Attorneys Deskbook

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CHAPTER 22

CONTRACT DISPUTES ACT

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CONTRACT DISPUTES ACT

I. INTRODUCTION. As a result of this instruction, the student will understand:

A. The claims submission and dispute resolution processes provided by the Contract Disputes Act (CDA) (41 U.S.C. §§ 7101-7109).

B. The jurisdiction of the Armed Services Board of Contract Appeals (ASBCA) and the U.S. Court of Federal Claims (COFC) to decide appeals from contracting officer final decisions.

C. The role of the contract attorney in addressing contractor claims, defending against contractor appeals, and prosecuting government claims.

II. OVERVIEW.

A. Historical Development.

1. Pre-Civil War Developments. Before 1855, government contractors had no forum in which to sue the United States. In 1855, the Congress created the Court of Claims as an Article I (legislative) court to consider claims against the United States and recommend private bills to Congress. Act of February 24, 1855, 10 Stat. 612. The service secretaries, however, continued to resolve most contract claims. As early as 1861, the Secretary of War appointed a board of three officers to consider and decide specific contract claims. See Adams v. United States, 74 U.S. 463 (1868). Upon receipt of an adverse board decision, a contractor's only recourse was to request a private bill from Congress.

2. Civil War Reforms. In 1863, Congress expanded the power of the Court of Claims by authorizing it to enter judgments against the United States. Act of March 3, 1863, 12 Stat. 765. In 1887, Congress passed the Tucker Act to expand and clarify the jurisdiction of the Court of Claims. Act of March 3, 1887, 24 Stat. 505, codified at 28 U.S.C. § 1491. In that Act, Congress granted the Court of Claims authority to consider monetary claims based on: (1) the Constitution; (2) an act of Congress; (3) an executive regulation; or (4) an express or implied-in-fact contract.[1] As a result, a government contractor could now sue the United States as a matter of right.

[1] The Tucker Act did not give the Court of Claims authority to consider claims based on implied-in-law contracts.

3. Disputes Clauses. Agencies responded to the Court of Claim's increased oversight by adding clauses to government contracts that appointed specific agency officials (e.g., the contracting officer or the service secretary) as the final decision-maker for questions of fact. The Supreme Court upheld the finality of these officials' decisions in Kihlberg v. United States, 97 U.S. 398 (1878). The tension between the agencies' desire to decide contract disputes without outside interference, and the contractors' desire to resolve disputes in the Court of Claims, continued until 1978. This tension resulted in considerable litigation and a substantial body of case law.

4. Boards of Contract Appeals (BCAs). During World War I (WWI), the War and Navy Departments established full-time BCAs to hear claims involving wartime contracts. The War Department abolished its board in 1922, but the Navy board continued in name (if not fact) until World War II (WWII). Between the wars, an interagency group developed a standard disputes clause. This clause made contracting officers' decisions final as to all questions of fact. WWII again showed that boards of contract appeals were needed to resolve the massive number of wartime contract disputes. See Penker Constr. Co. v. United States, 96 Ct. Cl. 1 (1942). Thus, the War Department created a board of contract appeals, and the Navy revived its board. In 1949, the Department of Defense (DOD) merged the two boards to form the current ASBCA.

5. Post-WWII Developments. In a series of cases culminating in Wunderlich v. United States, 342 U.S. 98 (1951), the Supreme Court upheld the finality (absent fraud) of factual decisions issued under the disputes clause by a department head or his duly authorized representative. Congress reacted by passing the Wunderlich Act, 41 U.S.C. §§ 321-322, which reaffirmed that the Court of Claims could review factual and legal decisions by agency BCAs. At about the same time, Congress changed the Court of Claims from an Article I (legislative) to an Article III (judicial) court. Pub. L. No. 83-158, 67 Stat. 226 (1953). Later, the Supreme Court clarified the relationship between the Court of Claims and the agency BCAs by limiting the jurisdiction of the boards to cases "arising under" remedy granting clauses in the contract. See Utah Mining and Constr. Co. v. United States, 384 U.S. 394 (1966).

6. The Contract Disputes Act (CDA) of 1978, 41 U.S.C. §§ 7101-7109. Congress replaced the previous disputes resolution system with a comprehensive statutory scheme. Congress intended that the CDA:

   a. Help induce resolution of more disputes by negotiation prior to litigation;

   b. Equalize the bargaining power of the parties when a dispute exists;

c. Provide alternate forums suitable to handle the different types of disputes; and

d. Insure fair and equitable treatment to contractors and Government agencies. S. REP. NO. 95-1118, at 1 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5235.

7. Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25. Congress overhauled the Court of Claims and created a new Article I court (i.e., the Claims Court) from the old Trial Division of the Court of Claims. Congress also merged the Court of Claims and the Court of Customs and Patent Appeals to create the Court of Appeals for the Federal Circuit (CAFC).[2]

8. Federal Courts Administration Act of 1992, Pub. L. No. 102-572, 106 Stat. 3921. Congress changed the name of the Claims Court to the United States Court of Federal Claims (COFC), and expanded the jurisdiction of the court to include the adjudication of nonmonetary claims.

9. Federal Acquisition Streamlining Act (FASA) of 1994, Pub. L. No. 103-355, 108 Stat. 3243. Congress increased the monetary thresholds for requiring CDA certifications and requesting expedited and accelerated appeals.[3]

B. The Disputes Process.

1. The CDA establishes procedures and requirements for asserting and resolving claims subject to the Act.

2. Distinguishing bid protests from disputes.

a. In bid protests, disappointed bidders or offerors seek relief from actions that occur **before** contract award. See generally FAR Subpart 33.1.

b. In contract disputes, contractors seek relief from actions and events that occur **after** contract award (ie., contract administration). See generally FAR Subpart 33.2.

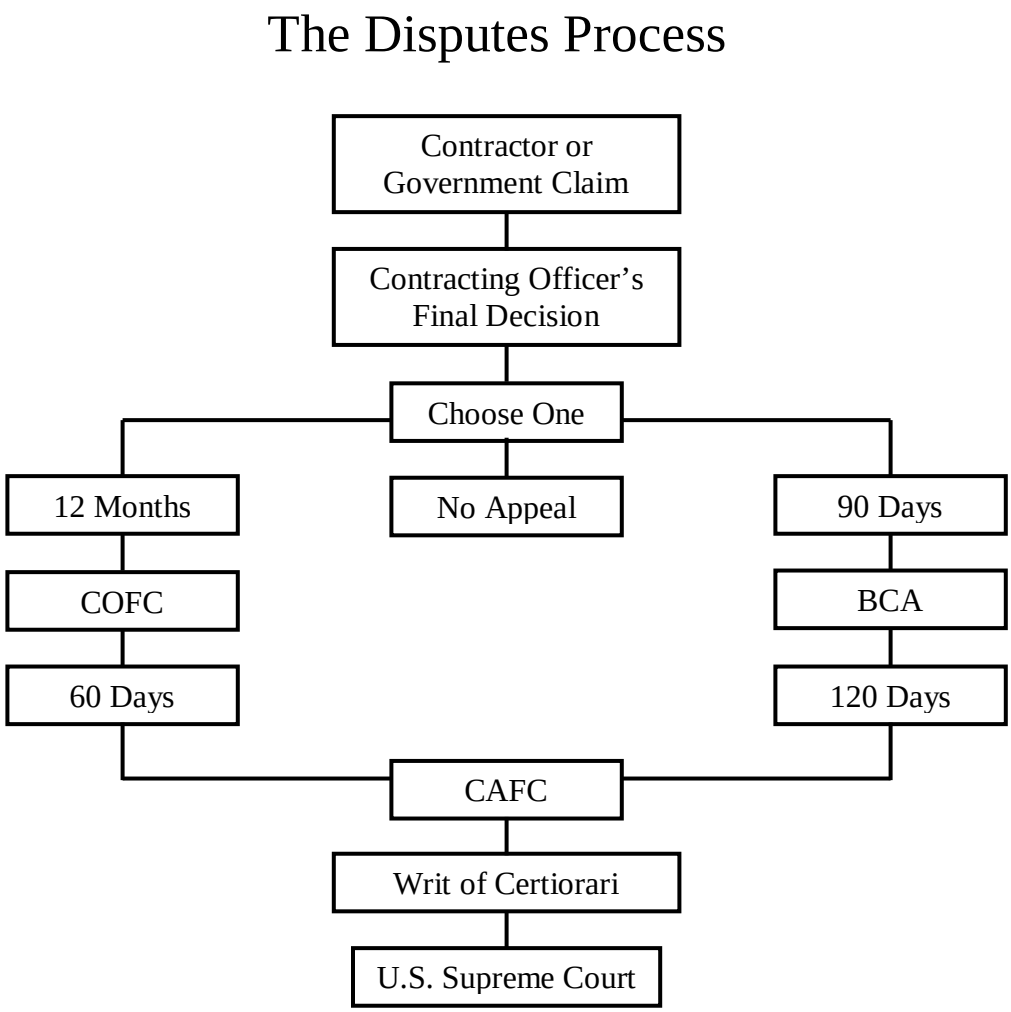
c. The Boards of Contract Appeals lack jurisdiction over bid protest actions. See United States v. John C. Grimberg, Inc., 702 F.2d 1362 (Fed. Cir. 1983) (stating that "the [CDA] deals with contractors, not with disappointed bidders); Ammon Circuits Research, ASBCA No. 50885, 97-2 BCA ¶ 29,318 (dismissing an

[2] The Act revised the jurisdiction of the new courts substantially.

[3] This Act represented Congress's first major effort to reform the federal procurement process since it passed the CDA.

appeal based on the contracting officer's written refusal to award the contractor a research contract); RC 27th Ave. Corp., ASBCA No. 49176, 97-1 BCA ¶ 28,658 (dismissing an appeal for lost profits arising from the contracting officer's failure to award the contractor a grounds maintenance services contract).

3. The disputes process flowchart.[4]



4. The Election Doctrine. The CDA provides alternative forums for challenging a contracting officer's final decision. Once a contractor files

[4] Note that for maritime contract actions, the CDA recognizes jurisdiction of district courts to hear appeals of ASBCA decisions, or to entertain suits filed following a contracting officer's final decision. See 41 U.S.C. § 7102(d); See also Marine Logistics, Inc. v. Secretary of the Navy, 265 F.3d 1322 (Fed. Cir. 2001) . *See* also L-3 Services, Inc., Aerospace Electronics Division v. United States, 104 Fed.Cl. 30 (Mar. 15, 2012)(holding that the exclusive jurisdiction of the Court of Federal Claims over bid protest matters involving maritime contracts has since been clarified and codified by the National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, 125 Stat. 1298 and cannot be extended to provide jurisdiction over plaintiff's claims, which do not arise under the court's exclusive bid protest jurisdiction but instead involve the performance of a maritime contract.)

its appeal in a particular forum, this election is normally binding and the contractor can no longer pursue its claim in the other forum. The "election doctrine," however, does not apply if the forum originally selected lacked subject matter jurisdiction over the appeal. 41 U.S.C. §§7104 (a) - (b).. See Bonneville Assocs. v. United States, 43 F.3d 649 (Fed. Cir. 1994) (dismissing the contractor's suit because the contractor originally elected to proceed before the GSBCA); see also Bonneville Assocs. v. General Servs. Admin., GSBCA No. 13134, 96-1 BCA ¶ 28,122 (refusing to reinstate the contractor's appeal), aff'd, Bonneville Assoc. v. United States, 165 F.3d 1360 (Fed. Cir. 1999).

III. APPLICABILITY OF THE DISPUTES CLAUSE.

A. Appropriated Fund Contracts.

1. The CDA applies to most express and implied-in-fact[5] contracts.[6] 41 U.S.C. § 7102(a); FAR 33.203.

2. The Federal Acquisition Regulation (FAR) implements the CDA by requiring the contracting officer to include a Disputes clause in solicitations and contracts.[7] FAR 33.215.

   a. FAR 52.233-1, Disputes, requires the contractor to continue to perform pending resolution of disputes "arising under"[8] the contract. See Attachment A.

   b. FAR 52.233-1, Alternate I, Disputes, requires the contractor to continue to perform pending resolution of disputes "arising under or relating to"[9] the contract.[10] See Attachment A.

[5] An "implied-in-fact" contract is similar to an "express" contract. It requires: (1) "a meeting of the minds" between the parties; (2) consideration; (3) an absence of ambiguity surrounding the offer and the acceptance; and (4) an agency official with actual authority to bind the government. James L. Lewis v. United States, 70 F.3d 597 (Fed. Cir. 1995).

[6] The CDA normally applies to contracts for: (1) the procurement of property; (2) the procurement of services; (3) the procurement of construction, maintenance, and repair work; and (4) the disposal of personal property. 41 U.S.C. § 7102(a). Cf. G.E. Boggs & Assocs., Inc., ASBCA Nos. 34841, 34842, 91-1 BCA ¶ 23,515 (holding that the CDA did not apply because the parties did not enter into a contract for the procurement of property, but retaining jurisdiction pursuant to the disputes clause in the contract).

[7] The CDA—and hence the Disputes clause—does not apply to: (1) tort claims that do not arise under or relate to an express or an implied-in-fact contract; (2) claims for penalties or forfeitures prescribed by statute or regulation that another federal agency is specifically authorized to administer, settle or determine; (3) claims involving fraud; and (4) bid protests. 41 U.S.C. §§ 7102 - 7103; FAR 33.203; FAR 33.209; FAR 33.210.

[8] "Arising under the contract" is defined as falling within the scope of a contract clause and therefore providing a remedy for some event occurring during contract performance. RALPH C. NASH ET AL., THE GOVERNMENT CONTRACTS REFERENCE BOOK, at 8 (2d ed. 1998).

B. Nonappropriated Fund (NAF) Contracts.

1. Exchange Service contracts. The CDA applies to contracts with the Army and Air Force, Navy, Marine Corps, Coast Guard, and NASA Exchanges. See 41 U.S.C. § 7102(a), 28 U.S.C. §§ 1346, 1491. The CDA does **not** apply to other nonappropriated fund contracts.[11] See e.g. Furash & Co. v. United States, 46 Fed. Cl. 518 (2000) (dismissing suit concerning contract with Federal Housing Finance Board).

2. In the past, the government often included a disputes clause in non-exchange NAF contracts, thereby giving a contractor the right to appeal a dispute to a BCA. See AR 215-4, Chapter 6, para.6-11c.(3); Charitable Bingo Assoc. Inc., ASBCA No. 53249, 01-2 BCA ¶ 31,478 (holding that the board had jurisdiction over a dispute with a NAF based on the inclusion of the disputes clause). Further, an agency directive granting NAF contractors a right of appeal has served as the basis for board jurisdiction, even when the contract contained no disputes clause. See DoDD 5515.6; Recreational Enters., ASBCA No. 32176, 87-1 BCA ¶ 19,675 (board had jurisdiction over NAF contract dispute because DOD directives required contract clause granting a right of appeal).

3. However, See Pacrim Pizza v. Secretary of the Navy, 304 F.3d 1291 (Fed. Cir. 2002) (CAFC refused to grant jurisdiction over non-exchange NAFI contract dispute; even though the contract included the standard disputes clause, the court held that only Congress can waive sovereign immunity, and the parties may not by contract bestow jurisdiction on a court). See also Sodexho Marriott Management, Inc., f/k/a Marriott Mgmt. Servs. V. United States, 61 Fed. Cl. 229 (2004) (holding that the non-appropriated funds doctrine barred the COFC from having jurisdiction over a NAF food service contract with the Marine Corps Recruit Morale, Welfare, and Recreation Center); cf. Frank P. Slattery v. United States, 635 F.3d 1298 (Fed. Cir. 2011) (Tucker Act is not limited by the appropriation status of the agency's funds or the source of funds by which any judgment may be paid).

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[9] "Relating to the contract" means having a connection to the contract. The term encompasses claims that cannot be resolved through a contract clause, such as for breach of contract or correction of mistakes. Prior to passage of the CDA, contractors pursued relief for mutual mistake (rescission or reformation) under the terms of Pub. L. No. 85-804 (see FAR 33.205; FAR Part 50, Extraordinary Contractual Actions). RALPH C. NASH ET AL., THE GOVERNMENT CONTRACTS REFERENCE BOOK, at 438 (2d ed. 1998).

[10] The Department of Defense (DOD) typically uses this clause for mission critical contracts, such as purchases of aircraft, naval vessels, and missile systems. DFARS 233.215.

[11] In addition, the CDA does not normally apply to: (1) Tennessee Valley Authority contracts; (2) contracts for the sale of real property; or (3) contracts with foreign governments or agencies. 41 U.S.C. § 7102 (b)-(c); FAR 33.203.

IV. CONTRACTOR CLAIMS.

A. Proper Claimants.

1. Only the parties to the contract (i.e., the prime contractor and the government) may normally submit a claim. 41 U.S.C. § 7103.

2. Subcontractors.

a. A subcontractor cannot file a claim directly with the contracting officer. United States v. Johnson Controls, 713 F.2d 1541 (Fed. Cir. 1983) (dismissing subcontractor claim); see also Detroit Broach Cutting Tools, Inc., ASBCA No. 49277, 96-2 BCA 28,493 (holding that the subcontractor's direct communication with the government did not establish privity); Southwest Marine, Inc., ASBCA No. 49617, 96-2 BCA ¶ 28,347 (rejecting the subcontractor's assertion that the Suits in Admiralty Act gave it the right to appeal directly); cf. Department of the Army v. Blue Fox, 119 S. Ct. 687 (1999) (holding that a subcontractor may not sue the government directly by asserting an equitable lien on funds held by the government). But see Choe-Kelly, ASBCA No. 43481, 92-2 BCA ¶ 24,910 (holding that the board had jurisdiction to consider the subcontractor's unsponsored claim alleging an implied-in-fact contract).

b. A prime contractor, however, can sponsor claims (also called "pass-through claims") on behalf of its subcontractors. Erickson Air Crane Co. of Washington, Inc. v. United States, 731 F.2d 810 (Fed. Cir. 1984); McPherson Contractors, Inc., ASBCA No. 50830, 98-1 BCA ¶ 29,349 (appeal dismissed where prime stated it did not wish to pursue the appeal).

3. Sureties. Absent privity of contract, sureties may not file claims. Admiralty Constr., Inc. v. Dalton, 156 F.3d 1217 (Fed. Cir. 1998) (surety must finance contract completion or take over performance to invoke doctrine of equitable subrogation); William A. Ransom and Robert D. Nesen v. United States, 900 F.2d 242 (Fed. Cir. 1990) (discussing doctrine of equitable subrogation). However, see also Fireman's Fund Insurance Co. v. England, 313 F.3d 1344 (Fed Cir. 2002) (although the doctrine of equitable subrogation is recognized by the COFC under the Tucker Act, the CDA only covers "claims by a contractor against the government relating to a contract," thus a surety is not a "contactor" under the CDA.

4. Dissolved/Suspended Corporations. A corporate contractor must possess valid corporate status, as determined by applicable state law, to assert a CDA appeal. See Micro Tool Eng'g, Inc., ASBCA No. 31136, 86-1 BCA ¶ 18,680 (holding that a dissolved corporation could not sue under New York law). But cf. Fre'nce Mfg. Co., ASBCA No. 46233, 95-2 BCA

¶ 27,802 (allowing a "resurrected" contractor to prosecute the appeal). Allied Prod. Management, Inc., and Richard E. Rowan, J.V., DOT CAB No. 2466, 92-1 BCA ¶ 24,585 (allowing a contractor to appeal despite its suspended corporate status). In determining what powers survive dissolution, courts and boards look to the laws of the state of incorporation. See AEI Pacific, Inc., ASBCA No. 53806, 05-1 BCA ¶ 32,859 (holding that a dissolved Alaska corporation could initiate proceedings before the ASBCA as part of its "winding up its affairs" as allowed by the Alaskan Statute concerning the dissolution Alaskan Corporations.)

B. Definition of a Claim.

1. Contract Disputes Act. The CDA does not define the term "claim." As a result, courts and boards look to the FAR for a definition. See Essex Electro Eng'rs, Inc. v. United States, 960 F.2d 1576 (Fed. Cir. 1992) (holding that the executive branch has authority to issue regulations implementing the CDA, to include defining the term "claim," and that the FAR definition is consistent with the CDA).

2. FAR. The FAR defines a "claim" as "a written demand or written assertion by one of the contracting parties seeking, as a matter of right, the payment of money in a sum certain, the adjustment or interpretation of contract terms, or other relief arising under or relating to a contract." FAR 2.101; FAR 52.233-1.

   a. Claims arising under or relating to the contract include those supported by remedy granting clauses, breach of contract claims, and mistakes alleged after award.

   b. A written demand (or written assertion) seeking the payment of money in excess of $100,000 is not a valid CDA claim until the contractor properly certifies it. FAR 2.101.

   c. A request for an equitable adjustment (REA) is not a "routine request for payment" and satisfies the FAR definition of "claim." Reflectone, Inc. v. Dalton, 60 F.3d 1572 (Fed. Cir. 1995).

   d. A voucher, invoice, or other routine request for payment that is not in dispute when submitted is not a valid CDA claim. FAR 2.101; 52.233-1. A contractor may convert such a submission into a valid CDA claim if:

      (1) The contractor complies with the submission and certification requirements of the Disputes clause; and

      (2) The contracting officer:

(a) Disputes the submission as to either liability or amount; or

(b) Fails to act in a reasonable time. FAR 33.201; FAR 52.233-1. See S-TRON, ASBCA No. 45890, 94-3 BCA ¶ 26,957 (contracting officer's failure to respond for 6 months to contractor's "relatively simple" engineering change proposal (ECP) and REA was unreasonable).

C. Elements of a Claim.

1. The demand or assertion must be in writing. 41 U.S.C. § 7103(a)(2); FAR 33.201. See Honig Indus. Diamond Wheel, Inc., ASBCA No. 46711, 94-2 BCA ¶ 26,955 (granting the government's motion to strike monetary claims that the contractor had not previously submitted to the contracting officer); Clearwater Constructors, Inc. v. United States, 56 Fed. Cl. 303 (2003) (a subcontractor's letter detailing its dissatisfaction with a contracting officer's contract interpretation, attached to a contractor's cover-letter requesting a formal review and decision, constituted a non-monetary claim under the CDA).

2. Seeking as a matter of right,[12] one of the following:

a. Payment of money in a sum certain;

b. Adjustment or interpretation of contract terms. TRW, Inc., ASBCA Nos. 51172 and 51530, 99-2 BCA ¶ 30,047 (seeking decision on allowability and allocability of certain costs). Compare William D. Euille & Assocs., Inc. v. General Services Administration, GSBCA No. 15,261, 2000 GSBCA LEXIS 105 (May 3, 2000) (dispute concerning directive to remove and replace building materials proper contract interpretation claim), with Rockhill Industries, Inc., ASBCA No. 51541, 00-1 BCA ¶ 30,693 (money claim "masquerading as claim for contract interpretation"); or

c. Other relief arising under or relating to the contract. See General Electric Co.; Bayport Constr. Co., ASBCA Nos. 36005, 38152, 39696, 91-2 BCA ¶ 23,958 (demand for contractor to replace or correct latent defects under Inspection clause).

(1) Reformation or Rescission. See McClure Electrical Constructors, Inc. v. United States, 132 F.3d 709 (Fed. Cir. 1997); LaBarge Products, Inc. v. West, 46 F.3d 1547 (Fed.

[12] Some submissions, such as cost proposals for work the government later decides it would like performed, would not be considered submissions seeking payment "as a matter of right." Reflectone v. Dalton, 60 F.3d 1572, n.7 (Fed. Cir. 1995).

Cir. 1995) (ASBCA had jurisdiction to entertain reformation claim).

(2) Specific performance is not an available remedy. Western Aviation Maintenance, Inc. v. General Services Administration, GSBCA No. 14165, 98-2 BCA ¶ 29,816.

3. Submitted to the contracting officer for a decision. 41 U.S.C. § 7103(a).

a. The Federal Circuit has interpreted the CDA's submission language as requiring the contractor to "commit" the claim to the contracting officer and "yield" to his authority to make a final decision. Dawco Constr., Inc. v. United States, 930 F.2d 872 (Fed. Cir. 1991).

b. The claim need not be sent only to the contracting officer, or directly to the contracting officer. If the contractor submits the claim to its primary government contact with a request for a contracting officer's final decision, and the primary contact delivers the claim to the contracting officer, the submission requirement can be met. Neal & Co. v. United States, 945 F.2d 385 (Fed. Cir. 1991) (claim requesting contracting officer's decision addressed to Resident Officer in Charge of Construction). See also D.L. Braughler Co., Inc. v. West, 127 F.3d 1476 (Fed. Cir. 1997) (submission to resident engineer not seeking contracting officer decision not a claim); J&E Salvage Co., 37 Fed. Cl. 256 (1997) (letter submitted to the Department of Justice rather than the Defense Reutilization and Marketing Office was not a claim).

c. Only receipt by the contracting officer triggers the time limits and interest provisions set forth in the CDA. See 41 U.S.C. § 7103(a), § 7109.

d. A claim should implicitly or explicitly request a contracting officer's final decision. See Ellett Constr. Co., Inc. v. United States, 93 F.3d 1537 (Fed. Cir. 1996) (holding that submission to the contracting officer is required, but the request for a final decision may be implied); Heyl & Patterson, Inc. v. O'Keefe, 986 F.2d 480, 483 (Fed. Cir. 1993) (stating that "a request for a final decision can be implied from the context of the submission"); Transamerica Ins. Corp. v. United States, 973 F.2d 1572, 1576 (Fed. Cir. 1992) (stating that no "magic words" are required "as long as what the contractor desires by its submissions is a final decision").

e. A contracting officer cannot issue a valid final decision if the contractor explicitly states that it is not seeking a final decision.

Fisherman's Boat Shop, Inc. ASBCA No. 50324, 97-2 BCA ¶ 29,257 (holding that the contracting officer's final decision was a nullity because the contractor did not intend for its letter submission to be treated as a claim).

4. Certification. A contractor must certify any claim that exceeds $100,000. 41 U.S.C. § 7103(b); FAR 33.207. CDA certification serves to create the deterrent of potential liability for fraud and thereby discourage contractors from submitting unwarranted or inflated claims. See Fischbach & Moore Int'l Corp. v. Christopher, 987 F.2d 759 (Fed. Cir. 1993).

   a. Determining the Claim Amount.

      (1) A contractor must consider the aggregate effect of increased and decreased costs to determine whether the claim exceeds the dollar threshold for certification.[13] FAR 33.207(d).

      (2) Claims that are based on a "common or related set of operative facts" constitute one claim. Placeway Constr. Corp., 920 F.2d 903 (Fed. Cir. 1990).

      (3) A contractor may not split a single claim that exceeds $100,000 into multiple claims to avoid the certification requirement. See, e.g., Walsky Constr. Co v. United States, 3 Ct. Cl. 615 (1983); Warchol Constr. Co. v. United States, 2 Cl. Ct. 384 (1983); D&K Painting Co., Inc., DOTCAB No. 4014, 98-2 BCA ¶ 30,064; Columbia Constr. Co., ASBCA No. 48536, 96-1 BCA ¶ 27,970; Jay Dee Militarywear, Inc., ASBCA No. 46539, 94-2 BCA ¶ 26,720.

      (4) Separate claims that total less than $100,000 each require no certification, even if their combined total exceeds $100,000. See Engineered Demolition, Inc. v. United States, 60 Fed.Cl. 822 (2004) (holding that appellants claim of $69,047 and $38,940 sponsored on behalf of appellant's sub-contractor were separate, having arose out of different factual predicates, each under $100,000.), Phillips Constr. Co., ASBCA No. 27055, 83-2 BCA ¶ 16,618; B. D. Click Co., ASBCA No. 25609, 81-2 BCA ¶ 15,394.

      (5) The contracting officer cannot consolidate separate claims to create a single claim that exceeds $100,000. See B. D. Click Co., Inc., ASBCA No. 25609, 81-2 BCA ¶ 15,395.

[13] The contractor need not include the amount of any government claims in its calculations. J. Slotnik Co., VABCA No. 3468, 92-1 BCA ¶ 24,645.

Courts and boards, however, can consolidate separate claims for hearing to promote judicial economy.

(6) A contractor need not certify a claim that grows to exceed $100,000 after the contractor submits it to the contracting officer if:

(a) The increase was based on information that was not reasonably available at the time of the initial submission; or

(b) The claim grew as the result of a regularly accruing charge and the passage of time. See Tecom, Inc. v. United States, 732 F.2d 935 (Fed. Cir. 1984) (concluding that the contractor need not certify a $11,000 claim that grew to $72,000 after the government exercised certain options); AAI Corp. v. United States, 22 Cl. Ct. 541 (1991) (refusing to dismiss a claim that was $0 when submitted, but increased to $500,000 by the time the suit came before the court); Mulunesh Berhe, ASBCA No. 49681, 96-2 BCA ¶ 28,339.

b. Certification Language Requirement. FAR 33.207(c). When required to do so, a contractor must certify that:

(1) The claim is made in good faith;

(2) The supporting data are accurate and complete to the best of the contractor's knowledge and belief;

(3) The amount requested accurately reflects the contract adjustment for which the contractor believes the government is liable; and

(4) The person submitting the claim is duly authorized to certify the claim on the contractor's behalf.[14]

[14] Absent extraordinary circumstances, courts and boards will not question the accuracy of the statements in a contractor's certification. D.E.W., Inc., ASBCA No. 37332, 94-3 BCA ¶ 27,004. A prime contractor need not agree with all aspects or elements of a subcontractor's claim. In addition, a prime contractor need not be certain of the government's liability, or the amount recoverable. The prime contractor need only believe that the subcontractor has good grounds to support its claim. See Oconto Elec., Inc., ASBCA No. 45856, 94-3 BCA ¶ 26,958 (holding that the prime contractor properly certified its subcontractor's claim, even though the official certifying the claim lacked personal knowledge of the amount claimed); see also Arnold M. Diamond, Inc. v. Dalton, 25 F.3d 1006 (Fed. Cir. 1994) (upholding the contractor's submission of a subcontractor's claim pursuant to a court order).

c. Proper Certifying Official. A contractor may certify its claim through "any person duly authorized to bind the contractor with respect to the claim." 41 U.S.C. § 7103(b)(2); FAR 33.207(e). See Metric Constructors, Inc., ASBCA No. 50843, 98-2 BCA ¶ 30,088 (concluding that senior project manager was proper certifying official); Green Dream Group, ASBCA No. 57413, Apr. 4, 2011, 11-1 BCA ¶ 34,739 (concluding chief financial officer was proper certifying official).

d. No claim vs. Defective Certification. Tribunals treat cases where an attempted certification is "substantially" compliant differently from those where the certification is either entirely absent or the language is intentionally or negligently defective.

(1) No claim.

(a) Absence of Certification. No valid claim exists. See FAR 33.201 ("Failure to certify shall not be deemed to be a defective certification."); Hamza v. United States, 31 Fed. Cl. 315 (1994) (complete lack of an attempted certification); Eurostyle Inc., ASBCA No. 45934, 94-1 BCA ¶ 26,458 ("complete absence of any certification is not a mere defect which may be corrected").

(b) Certifications made with intentional, reckless, or negligent disregard of CDA certification requirements are not correctable. See Walashek Industrial & Marine, Inc., ASBCA No. 52166, 00-1 BCA ¶ 30,728 (two prongs of certificate omitted or not fairly compliant); Keydata Sys, Inc. v. Department of the Treasury, GSBCA No. 14281-TD, 97-2 BCA ¶ 29,330 (denying the contractor's petition for a final decision because it failed to correct substantial certification defects).

(c) Failure to properly sign or execute claim not correctable. F Tokyo Co., ASBCA No. 59059, Apr. 23, 2014, 2014 WL 1792750; Teknocraft Inc., ASBCA No. 55438, Apr. 3, 2008, 08-1 BCA ¶ 33,846.

(2) Claim with "Defective" Certification. 41 U.S.C. § 7103(b)(3); FAR 33.201 defines a defective certification as one "which alters or otherwise deviates from the language in 33.207(c) or which is not executed by a person duly authorized to bind the contractor with respect to the claim."

(a) Exact recitation of the language of 41 U.S.C. § 7103(b)(1) and FAR 33.207(c) is not required—"substantial compliance" suffices. See Fischbach & Moore Int'l Corp. v. Christopher, 987 F.2d 759 (Fed. Cir. 1993) (substituting the word "understanding" for "knowledge" did not render certificate defective). However, See URS Energy & Construction, Inc. v. Department of Energy, CBCA No. 2589,May 30, 2012, 12-1 BCA ¶ 35,055 where the court found the purported certification to be defective and not curable because the first and fourth prong of the CDA certification language were absent.

(b) Technical defects are correctable. Examples include missing certifications when two or more claims are deemed to be a larger claim requiring certification, and certification by the wrong representative of the contractor. See FAR 33.201; FAR 33.207(f); H.R. Rep. No. 102-1006, 102d Cong., 2d Sess. 28, reprinted in 1992 U.S.C.C.A. at 3921, 3937.

(c) Certifications used for other purposes may be acceptable even though they do not include the language required by the CDA. See James M. Ellett Const. Co., Inc. v. United States, 93 F.3d 1537 (Fed. Cir. 1996) (SF 1436 termination proposal not substantially deficient as a CDA certificate); Metric Constructors, Inc., ASBCA No. 50843, 98-2 BCA ¶ 30,088; Zaafer Taahhut Insaat Ve Ticaret A.S., ASBCA No. 56770, Sept. 14, 2011, 11-2 BCA ¶ 34841 (REA submitted with CDA certification is a claim). Compare SAE/Americon - Mid-Atlantic, Inc., GSBCA No. 12294, 94-2 BCA ¶ 26,890 (holding that the contractor's "certificate of current cost or pricing data" on SF 1411 was susceptible of correction, even though it did not include the first and third statements required for a proper CDA certification), with Scan-Tech Security, L.P. v. United States, 46 Fed. Cl. 326 (2000) (suit dismissed after court equated use of SF 1411 with no certification).

(d) The CO need not render a final decision if he notifies the contractor in writing of the defect within 60 days after receipt of the claim. 41 U.S.C. § 7103(b)(3).

(e) Interest on a claim with a defective certification shall be paid from the date the contracting officer initially received the claim. FAR 33.208(c).

(f) A defect will not deprive a court or board of jurisdiction, but it must be corrected before entry of a court's final judgment or a board's decision. 41 U.S.C. § 7103(b)(3).

D. Demand for a Sum Certain.

1. Where the essence of a dispute is the increased cost of performance, the contractor must demand a sum certain as a matter of right. Compare Essex Electro Eng'rs, Inc. v. United States, 22 Cl. Ct. 757, aff'd, 960 F.2d 1576 (Fed. Cir. 1992) (holding that a cost proposal for possible future work did not seek a sum certain as a matter of right); with J.S. Alberici Constr. Co., ENG BCA No. 6179, 97-1 BCA ¶ 28,639, recon. denied, ENG BCA No. 6179-R, 97-1 BCA ¶ 28,919 (holding that a request for costs associated with ongoing work, but not yet incurred, was a sum certain); McDonnell Douglas Corp., ASBCA No. 46582, 96-2 BCA ¶ 28,377 (holding that a sum certain can exist even if the contractor has not yet incurred any costs); Fairchild Indus., ASBCA No. 46197, 95-1 BCA ¶ 27,594 (holding that a request based on estimated future costs was a sum certain).

2. A claim states a sum certain if:

a. The government can determine the amount of the claim using a simple mathematical formula. Metric Constr. Co. v. United States, 1 Cl. Ct. 383 (1983); Mulunesh Berhe, ASBCA No. 49681, 96-2 BCA ¶ 28,339 (simple multiplication of requested monthly rate for lease); Jepco Petroleum, ASBCA No. 40480, 91-2 BCA ¶ 24,038 (claim requesting additional $3 per linear foot of excavation, when multiplied by total of 10,000 feet, produced sum certain).

b. Enlarged claim doctrine. Under this doctrine, a BCA or the COFC may exercise jurisdiction over a dispute that involves a sum in excess of that presented to the contracting officer for a final decision if:

(1) The increase in the amount of the claim is based on the same set of operative facts previously presented to the contracting officer; and

(2) The contractor neither knew nor reasonably should have known, at the time when the claim was presented to the contracting officer, of the factors justifying an increase in the amount of the claim. Johnson Controls World Services,

Inc. v. United States, 43 Fed. Cl. 589 (1999). See also Stencel Aero Engineering Corp., ASBCA No. 28654, 84-1 BCA ¶ 16,951 (finding essential character or elements of the certified claim had not been changed).

E. Supporting Data. Invoices, detailed cost breakdowns, and other supporting financial documentation need not accompany a CDA claim as a jurisdictional prerequisite. H.L. Smith v. Dalton, 49 F.3d 1563 (Fed. Cir. 1995) (contractor's failure to provide CO with additional information "simply delayed action on its claims"); John T. Jones Constr. Co., ASBCA No. 48303, 96-1 BCA ¶ 27,997 (stating that the contracting officer's desire for more information did not invalidate the contractor's claim submission).

F. Settlement.

1. Agencies should attempt to resolve claims by mutual agreement, if possible. FAR 33.204; FAR 33.210. See Pathman Constr. Co., Inc. v. United States, 817 F.2d 1573 (Fed. Cir. 1987) (stating that a "major purpose" of the CDA is to "induce resolution of contract disputes with the government by negotiation rather than litigation").

2. Only contracting officers or their authorized representatives may normally settle contract claims. See FAR 33.210; see also J.H. Strain & Sons, Inc., ASBCA No. 34432, 88-3 BCA ¶ 20,909 (refusing to enforce a settlement agreement that the agency's attorney entered into without authority). The Department of Justice (DOJ), however, has plenary authority to settle cases pending before the COFC. See Executive Business Media v. Department of Defense, 3 F.3d 759 (4th Cir. 1993).

3. Contracting officers are authorized, within the limits of their warrants, to decide or resolve all claims arising under or relating to the contract except for:

a. A claim or dispute for penalties or forfeitures prescribed by statute or regulation that another Federal agency is specifically authorized to administer, settle, or determine; or

b. The settlement, compromise, payment or adjustment of any claim involving fraud.[15] FAR 33.210.

G. Interest.

[15] When a claim is suspected to be fraudulent, the contracting officer shall refer the matter to the agency official responsible for investigating fraud. FAR 33.209. To justify a stay in a Board proceeding, the movant has the burden to show there are substantially similar issues, facts and witnesses in civil and criminal proceedings, and there is a need to protect the criminal litigation which overrides any injury to the parties by staying the civil litigation. Afro-Lecon, Inc. v. United States, 820 F.2d 1198 (Fed. Cir. 1987); T. Iida Contracting, Ltd., ASBCA No. 51865, 00-1 BCA ¶ 30,626; Kellogg, Brown & Root Services, Inc., ASBCA No. 56358, Nov. 23, 2010, 11-1 BCA ¶ 34,614.

1. Interest on CDA claims is calculated every six months based on a rate established by the Secretary of the Treasury pursuant to Pub. L. No. 92-41, 85 Stat. 97. 41 U.S.C. § 7109; FAR 33.208.

2. Established interest rates can be found at www.treasurydirect.gov.

3. Interest may begin to accrue on costs before the contractor incurs them. See Servidone Constr. Corp. v. United States, 931 F.2d 860 (Fed. Cir. 1991) (stating that 41 U.S.C. § 611 (recodified as 41 U.S.C. § 7109) "sets a single, red-letter date for the interest of all amounts found due by a court without regard to when the contractor incurred the costs"); see also Caldera v. J.S. Alberici Constr. Co., 153 F.3d 1381 (Fed Cir. 1998) (holding that 41 U.S.C. § 611 "trumps" conflicting regulations that prohibit claims for future costs).

H. Termination for Convenience (T4C) Settlement Proposals. FAR 49.206.

1. A contractor may submit a settlement proposal for costs associated with the termination of a contract for the convenience of the government. FAR 49.206-1; FAR 49.602-1. See Standard Form (SF) 1435, Settlement Proposal (Inventory Basis); SF 1436, Settlement Proposal (Total Cost Basis); SF 1437, Settlement Proposal for Cost-Reimbursement Type Contracts; SF 1438, Settlement Proposal (Short Form).

2. Courts and boards consider T4C settlement proposals to be "nonroutine" submissions under the CDA. See Ellett, 93 F.3d at 1542 (stating that "it is difficult to conceive of a less routine demand for payment than one which is submitted when the government terminates a contract for its convenience").

   a. Courts and boards, however, do not consider T4C settlement proposals to be CDA claims when submitted because contractors normally do not submit them for a contracting officer's final decision—they submit them to facilitate negotiations. See Ellett Constr. Co., Inc. v. United States, 93 F.3d 1537 (Fed. Cir. 1996) (T4C settlement proposal was not a claim because the contractor did not submit it to the contracting officer for a final decision); see also Walsky Constr. Co. v. United States, 173 F.3d 1312 (Fed. Cir. 1999) (T4C settlement proposal was not a claim because it had not yet been the subject of negotiations with the government); cf. Medina Constr., Ltd. v. United States, 43 Fed. Cl. 537, 551 (1999) (parties may reach an impasse without entering into negotiations if allegations of fraud prevent the contracting officer from entering into negotiations).

   b. A T4C settlement proposal may "ripen" into a CDA claim once settlement negotiations reach an impasse. See Ellett, 93 F.3d at 1544 (holding that the contractor's request for a final decision

following ten months of "fruitless negotiations" converted its T4C settlement proposal into a claim); Metric Constructors, Inc., ASBCA No. 50843, 98-2 BCA ¶ 30,088 (holding that a contractor's T4C settlement proposal ripened into a claim when the contracting officer issued a unilateral contract modification following the parties' unsuccessful negotiations); cf. FAR 49.109-7(f) (stating that a contractor may appeal a "settlement by determination" under the Disputes clause unless the contractor failed to submit its T4C settlement proposal in a timely manner); Systems Development Corp. v. McHugh, 658 F.3d 1341, 1345 (Fed. Cir. 2011) (impasse not required for an equitable adjustment claim to accrue).

3. Certification. If a CDA certification is required, the contractor may rely on the standard certification in whichever SF the FAR requires it to submit. See Ellett, 93 F.3d at 1545 (rejecting the government's argument that proper certification of a T4C settlement proposal is a jurisdictional prerequisite); see also Metric Constructors, Inc., supra. (concluding that the contractor could "correct" the SF 1436 certification to comply with the CDA certification requirements).

4. Interest. The FAR precludes the government from paying interest under a settlement agreement or determination; however, the FAR permits the government to pay interest on a contractor's successful appeal. FAR 49.112-2(d). Therefore, the government cannot pay interest on a T4C settlement proposal unless it "ripens" into a CDA claim and the contractor successfully appeals to the ASBCA or the COFC. See Ellett, 93 F.3d at 1545 (recognizing the fact that T4C settlement proposals are treated disparately for interest purposes); see also Central Envtl, Inc., ASBCA 51086, 98-2 BCA ¶ 29,912 (concluding that interest did not begin to run until after the parties' reached an impasse and the contractor requested a contracting officer's final decision).

I. Statute of Limitations.

1. In 1987, the Federal Circuit concluded that the six-year statute of limitations in the Tucker Act does not apply to CDA appeals. Pathman Constr. Co. v. United States, 817 F.2d 1573 (Fed. Cir. 1987).

2. In 1994, Congress revised the CDA to impose a six-year statute of limitations. Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103-355, 108 Stat. 3243 (codified at 40 U.S.C. § 605). See FAR 33.206; see also Motorola, Inc. v. West, 125 F.3d 1470 (Fed. Cir. 1997).

   a. For contracts awarded on or after 1 October 1995, a contractor must submit its claim within six years of the date the claim accrues.

b. A claim accrues when "all events, that fix the alleged liability...and permit assertion of the claim, were known or should have been known," and some injury has occurred. Raytheon Company, Space & Airborne Systems, ASBCA No. 57801, Apr. 22,2013, 13-1 BCA ¶ 35,319.

c. This statute of limitations provision does not apply to government claims based on contractor claims involving fraud.

V. GOVERNMENT CLAIMS.

A. Requirement for Final Decision. 41 U.S.C. § 7103(a)(3); FAR 52.233-1(d)(1).

1. The government may assert a claim against a contractor; however, the claim must be the subject of a contracting officer's final decision.

2. Some government actions are immediately appealable.

a. Termination for Default. A contracting officer's decision to terminate a contract for default is an immediately appealable government claim. Independent Mfg. & Serv. Cos. of Am., Inc., ASBCA No. 47636, 94-3 BCA ¶ 27,223. See Malone v. United States, 849 F.2d 1441, 1443 (Fed. Cir. 1988); cf. Educators Assoc., Inc. v. United States, 41 Fed. Cl. 811 (1998) (dismissing the contractor's suit as untimely because the contractor failed to appeal within 12 months of the date it received the final termination decision).

b. Withholding Monies. A contracting officer's decision to withhold monies otherwise due the contractor through a set off is an immediately appealable government claim. Placeway Constr. Corp. United States, 920 F.2d 903, 906 (Fed. Cir. 1990); Sprint Communications Co., L.P. v. General Servs. Admin., GSBCA No. 14263, 97-2 BCA ¶ 29,249; cf. Thomas & Sons Bldg. Contractors, Inc., ASBCA No. 51590, Apr. 9, 2002, 02-1 BCA ¶ 31,837 (Board lacked jurisdiction to hear appeal of a withholding because a claim was never submitted to the contracting officer).

c. Cost Accounting Standards (CAS) Determination. A contracting officer's decision regarding the allowability of costs under the CAS is often an immediately appealable government claim. See Newport News Shipbuilding and Dry Dock Co. v. United States, 44 Fed. Cl. 613 (1999) (government's demand that the contractor change its accounting for all of its CAS-covered contracts was an appealable final decision); Litton Sys., Inc., ASBCA No. 45400, 94-2 BCA ¶ 26,895 (holding that the government's determination

was an appealable government claim because the government was "seeking, as a matter of right, the adjustment or interpretation of contract terms"); cf. Aydin Corp., ASBCA No. 50301, 97-2 BCA ¶ 29,259 (holding that the contracting officer's failure to present a claim arising under CAS was a nonjurisdictional error).

d. Miscellaneous Demands. See Bean Horizon-Weeks (JV), ENG BCA No. 6398, 99-1 BCA ¶ 30,134 (holding that a post-appeal letter demanding repayment for improper work was an appealable final decision); Outdoor Venture Corp., ASBCA No. 49756, 96-2 BCA ¶ 28,490 (holding that the government's demand for warranty work was a claim that the contractor could immediately appeal); Sprint Communications Co. v. General Servs. Admin., GSBCA No. 13182, 96-1 BCA ¶ 28,068. But see Boeing Co., 25 Cl. Ct. 441 (1992) (holding that a post-termination letter demanding the return of unliquidated progress payments was not appealable); Iowa-Illinois Cleaning Co. v. General Servs. Admin., GSBCA No. 12595, 95-2 BCA ¶ 27,628 (holding that government deductions for deficient performance are not appealable absent a contracting officer's final decision).

3. As a general rule, the government may not assert a counterclaim that has not been the subject of a contracting officer's final decision.

B. Contractor Notice. Assertion of a government claim is usually a two-step process. A demand letter gives the contractor notice of the potential claim and an opportunity to respond. If warranted, the final decision follows. See FAR 33.211(a) ("When a claim by or against a contractor cannot be satisfied or settled by mutual agreement and a decision on the claim is necessary"); Instruments & Controls Serv. Co., ASBCA No. 38332, 89-3 BCA ¶ 22,237 (dismissing appeal because final decision not preceded by demand); see also Bean Horizon-Weeks (JV), ENG BCA No. 6398, 99-1 BCA ¶ 30,134; B.L.I. Constr. Co., ASBCA No. 40857, 92-2 BCA ¶ 24,963 (stating that "[w]hen the Government is considering action, the contractor should be given an opportunity to state its position, express its views, or explain, argue against, or contest the proposed action").

C. Certification. Neither party is required to certify a government claim. 41 U.S.C. §§ 7103(b). See Placeway Constr. Corp., 920 F.2d at 906; Charles W. Ware, GSBCA No. 10126, 90-2 BCA ¶ 22,871. A contractor, however, must certify its request for interest on monies deducted or withheld by the government. General Motors Corp., ASBCA No. 35634, 92-3 BCA ¶ 25,149.

D. Interest. Interest on a government claim begins to run when the contractor receives the government's initial written demand for payment. FAR 52.232-17.

E. Finality. Once the contracting officer's decision becomes final (i.e., once the appeal period has passed), the contractor cannot challenge the merits of that decision judicially. 41 U.S.C. § 7103(g). See Seaboard Lumber Co. v. United

States, 903 F.2d 1560, 1562 (Fed. Cir. 1990); L.A. Constr., Inc., 95-1 BCA¶ 27,291 (holding that the contractor's failure to appeal the final decision in a timely manner deprived the board of jurisdiction, even though both parties testified on the merits during the hearing).

VI. FINAL DECISIONS.

A. General. The contracting officer must issue a written final decision on all claims. 41 U.S.C. § 7103(d); FAR 33.206; FAR 33.211(a). See Tyger Constr. Co., ASBCA No. 36100, 88-3 BCA ¶ 21,149. But cf. McDonnell Douglas Corp., ASBCA No. 44637, 93-2 BCA ¶ 25,700 (dismissing the contractor's appeal from a government claim for noncompliance with CAS because the procuring contracting officer issued the final decision instead of the cognizant administrative contracting officer as required by the FAR and DFARS).

B. Time Limits. A contracting officer must issue a final decision on a contractor's claim within certain statutory time limits. 41 U.S.C. § 7103(f); FAR 33.211.

1. Claims of $100,000 or less. The contracting officer must issue a final decision within 60 days.

2. Certified Claims Exceeding $100,000. The contracting officer must take one of the following actions within 60 days:

a. Issue a final decision; or

b. Notify the contractor of a firm date by which the contracting officer will issue a final decision.[16] See Boeing Co. v. United States, 26 Cl. Ct. 257 (1992); Aerojet Gen. Corp., ASBCA No. 48136, 95-1 BCA ¶ 27,470 (concluding that the contracting officer failed to provide a firm date where the contracting officer made the timely issuance of a final decision contingent on the contractor's cooperation in providing additional information); Inter-Con Security Sys., Inc., ASBCA No. 45749, 93-3 BCA ¶ 26,062 (concluding that the contracting officer failed to provide a firm date where the contracting officer merely promised to render a final decision within 60 days of receiving the audit).

3. Uncertified and Defectively Certified Claims Exceeding $100,000.

a. FAR 33.211(e) The contracting officer has no obligation to issue a final decision on a claim that exceeds $100,000 if the claim is:

[16] The contracting officer must issue the final decision within a reasonable period. What constitutes a "reasonable" period depends on the size and complexity of the claim, the adequacy of the contractor's supporting data, and other relevant factors. 41 U.S.C. § 7103(f)(3); FAR 33.211(d). See Defense Sys. Co., ASBCA No. 50534, 97-2 BCA ¶ 28,981 (holding that nine months to review a $72 million claim was reasonable).

(1) Uncertified; or

(2) Defectively certified.

b. If the claim is defectively certified, the contracting officer must notify the contractor, in writing, within 60 days of the date the contracting officer received the claim of the reason(s) why any attempted certification was defective.

4. Failure to Issue a Final Decision. FAR 33.211(g)

a. If the contracting officer fails to issue a final decision within a reasonable period of time, the contractor can:

(1) Request the tribunal concerned to direct the contracting officer to issue a final decision. 41 U.S.C. § 7103(f)(4); FAR 33.211(f). See American Industries, ASBCA No. 26930-15, 82-1 BCA ¶ 15,753.

(2) Treat the contracting officer's failure to issue a final decision as an appealable final decision (i.e., a "deemed denial"). 41 U.S.C. § 7103(f)(5); FAR 33.211(g). See Aerojet Gen. Corp., ASBCA No. 48136, 95-1 BCA ¶ 27,470.

b. A BCA, however, cannot direct the contracting officer to issue a more detailed final decision than the contracting officer has already issued. A.D. Roe Co., ASBCA No. 26078, 81-2 BCA ¶ 15,231.

C. Format. 41 U.S.C. § 7103(e); FAR 33.211(a)(4).

1. The final decision must be written. Tyger Constr. Co., ASBCA No. 36100, 88-3 BCA ¶ 21,149.

2. In addition, the final decision must:

a. Describe the claim or dispute;

b. Refer to the pertinent or disputed contract terms;

c. State the disputed and undisputed facts;

d. State the decision and explain the contracting officer's rationale;

e. Advise the contractor of its appeal rights; and

f. Demand the repayment of any indebtedness to the government.

3. Rights Advisement.

a. FAR 33.211(a)(4)(v) specifies that the final decision should include a paragraph substantially as follows:

> This is a final decision of the Contracting Officer. You may appeal this decision to the agency board of contract appeals. If you decide to appeal, you must, within 90 days from the date you receive this decision, mail or otherwise furnish written notice to the agency board of contract appeals and provide a copy to the Contracting Officer from whose decision the appeal is taken. The notice shall indicate that an appeal is intended, reference this decision, and identify the contract by number. With regard to appeals to the agency board of contract appeals, you may, solely at your election, proceed under the board's small claim procedure for claims of $50,000 or less or its accelerated procedure for claims of $100,000 or less. Instead of appealing to the agency board of contract appeals, you may bring an action directly in the United States Court of Federal Claims (except as provided in the Contract Disputes Act of 1978, 41 U.S.C. 603, regarding Maritime Contracts) within 12 months of the date you receive this decision.

b. Failure to properly advise the contractor of its appeal rights may prevent the "appeals clock" from starting. If the contracting officer's rights advisory is deficient, the contractor must demonstrate that, but for its detrimental reliance upon the faulty advice, its appeal would have been timely. Decker & Co. v. West, 76 F.3d 1573 (Fed. Cir. 1996).

4. Specific findings of fact are not required and, if made, are not binding on the government in any subsequent proceedings. See Wilner v. United States, 24 F.3d 1397 (Fed. Cir. 1994) (concluding that admissions favorable to the contractor do not constitute evidence of government liability).

D. Delivery. 41 U.S.C. § 7103(d); FAR 33.211(b).

1. The contracting officer must mail (or otherwise furnish) a copy of the final decision to the contractor. See Images II, Inc., ASBCA No. 47943, 94-3 BCA ¶ 27,277 (holding that receipt by the contractor's employee constituted proper notice).

2. The contracting officer should use certified mail, return receipt requested, or by any other method that provides evidence of receipt.

3. The contracting officer should preserve all evidence of the date the contractor received the contracting officer's final decision. See Omni Abstract, Inc., ENG BCA No. 6254, 96-2 BCA ¶ 28,367 (relying on a government attorney's affidavit to determine when the 90-day appeals period started). See Trygve Dale Westergard v. Services Administration, CBCA No. 2522, Sept. 15, 2011 (Board denied the government request to dismiss the appeal as untimely because the contracting officer submitted the final decision to the contractor via e-mail and could not provide any proof of a return receipt).

   a. When hand delivering the final decision, the contracting officer should require the contractor to sign for the document.

   b. When using a FAX transmission, the contracting officer should confirm receipt and memorialize the confirmation in a written memorandum. See Mid-Eastern Indus., Inc., ASBCA No. 51287, 98-2 BCA ¶ 29,907 (concluding that the government established a prima facie case by presenting evidence to show that it successfully transmitted the final decision to the contractor's FAX number); see also Public Service Cellular, Inc., ASBCA No. 52489, 00-1 BCA ¶ 30,832 (transmission report not sufficient evidence of receipt); Riley & Ephriam Constr. Co., Inc. v. United States, 408 F.3d 1369 (May 18, 2005)(fax machine printout of all faxes sent which showed appellant's attorney's office received a fax, and contracting officer's statement at trial that she faxed the final decision on the day and time shown on fax print out were not "objective indicia of receipt" as required by the CDA).

E. Independent Act of a Contracting Officer.

1. The final decision must be the contracting officer's personal, independent act. Compare PLB Grain Storage Corp. v. Glickman, 113 F.3d 1257 (Fed. Cir. 1997) (unpub.) (holding that a termination was proper even though a committee of officials directed it); Charitable Bingo Associates d/b/a Mr. Bingo, Inc., ASBCA Nos. 53249, 53470, 05-01 BCA 32,863 (finding the Contracting Officer utilized independent judgment in terminating appellant's contract after the Assistant Secretary of the Army (MR&A) issued a policy memorandum prohibiting contractor-operated bingo programs within the Army MWR programs) with Climatic Rainwear Co. v. United States, 88 F. Supp. 415 (Ct. Cl. 1950) (holding that a termination was improper because the contracting officer's attorney prepared the termination findings without the contracting officer's participation).

2. The contracting officer should seek assistance from engineers, attorneys, auditors, and other advisors. See FAR 1.602-2 (requiring the contracting officer to request and consider the advice of "specialists," as appropriate); FAR 33.211(a)(2) (requiring the contracting officer to seek assistance from "legal and other advisors"); see also Pacific Architects & Eng'rs, Inc.

v. United States, 203 Ct. Cl. 499, 517 (1974) (opining that it is unreasonable to preclude the contracting officer from seeking legal advice); Prism Constr. Co., ASBCA No. 44682, 97-1 BCA ¶ 28,909 (indicating that the contracting officer is not required to independently investigate the facts of a claim before issuing final decision); Environmental Devices, Inc., ASBCA No. 37430, 93-3 BCA ¶ 26,138 (approving the contracting officer's communications with the user agency prior to terminating the contract for default); cf. AR 27-1, para. 15-5a (noting the "particular importance" of the contracts attorney's role in advising the contracting officer on the drafting of a final decision).

F. Finality. 41 U.S.C. § 7103(g).

1. A final decision is binding and conclusive unless timely appealed.

2. Reconsideration.

a. A contracting officer may reconsider, withdraw, or rescind a final decision before the expiration of the appeals period. General Dynamics Corp., ASBCA No. 39866, 91-2 BCA ¶ 24,017. Cf. Daniels & Shanklin Constr. Co., ASBCA No. 37102, 89-3 BCA ¶ 22,060 (rejecting the contractor's assertion that the contracting officer could not withdraw a final decision granting its claim, and indicating that the contracting officer has an obligation to do so if the final decision is erroneous).

b. The contracting officer's rescission of a final decision, however, will not necessarily deprive a BCA of jurisdiction because jurisdiction vests as soon as the contractor files its appeal. See Security Servs., Inc., GSBCA No. 11052, 92-1 BCA ¶ 24,704; cf. McDonnell Douglas Astronautics Co., ASBCA No. 36770, 89-3 BCA ¶ 22,253 (indicating that the board would sustain a contractor's appeal if the contracting officer withdrew the final decision after the contractor filed its appeal).

c. A contracting officer may vacate his or her final decision unintentionally by agreeing to meet with the contractor to discuss the matters in dispute. See Sach Sinha and Assocs., ASBCA No. 46916, 95-1 BCA ¶ 27,499 (finding that the contracting officer "reconsidered" her final decision after she met with the contractor as a matter of "business courtesy" and requested the contractor to submit its proposed settlement alternatives in writing); Royal Int'l Builders Co., ASBCA No. 42637, 92-1 BCA ¶ 24,684 (holding that the contracting officer "destroyed the finality of his initial decision" by agreeing to meet with the contractor, even though the meeting was cancelled and the contracting officer subsequently sent the contractor a letter stating his intent to stand by his original decision).

d. To restart the appeal period after reconsidering a final decision, the contracting officer must issue a new final decision. Information Sys. & Networks Corp. v. United States, 17 Cl. Ct. 527 (1989); Sach Sinha and Assocs., ASBCA No. 46916, 95-1 BCA ¶ 27,499; Birken Mfg. Co., ASBCA No. 36587, 89-2 BCA ¶ 21,581.

3. The Fulford Doctrine. A contractor may dispute an underlying default termination as part of a timely appeal from a government demand for excess reprocurement costs, even though the contractor failed to appeal the underlying default termination in a timely manner. Fulford Mfg. Co., ASBCA No. 2143, 6 CCF ¶ 61,815 (May 20, 1955); Deep Joint Venture, GSBCA No. 14511, 02-2 BCA ¶ 31,914 (GSBCA confirms validity of the Fulford doctrine for post-CDA terminations).

VII. APPEALS TO THE ARMED SERVICES BOARD OF CONTRACT APPEALS (ASBCA).

A. The Right to Appeal. 41 U.S.C. § 7104(a). A contractor may appeal a contracting officer's final decision to an agency BCA.

B. The Armed Services Board of Contract Appeals (ASBCA).

1. The ASBCA consists of 25-30 administrative judges who dispose of approximately 800-900 appeals per year.

2. ASBCA judges specialize in contract disputes and come from both the government and private sectors. Each judge has at least five years of experience working in the field of government contract law.

3. The Rules of the Armed Services Board of Contract Appeals appear in Appendix A of the DFARS.

C. Jurisdiction. 41 U.S.C. § 7105(e)(1)(A). The ASBCA has jurisdiction to decide appeals regarding contracts made by:

1. The Department of Defense; or

2. An agency that has designated the ASBCA to decide the appeal.

D. Standard of Review. The ASBCA will review the appeal de novo. See 41 U.S.C. § 7103(e) (indicating that the contracting officer's specific findings of fact are not binding in any subsequently proceedings); see also Wilner v. United States, 24 F.3d 1397 (Fed. Cir. 1994) (en banc); Precision Specialties, Inc., ASBCA No. 48717, 96-1 BCA ¶ 28,054 (final decision retains no presumptive evidentiary weight nor is it binding on the Board).

E. Perfecting an Appeal.

1. Requirement. A contractor's notice of appeal (NOA) shall be mailed or otherwise furnished to the Board within 90 days from date of receipt of the final decision. A copy shall be furnished to the contracting officer. 41 U.S.C. § 7104(a); ASBCA Rule 1(a). See Cosmic Constr. Co. v. United States, 697 F.2d 1389 (Fed. Cir. 1982) (90 day filing requirement is statutory and cannot be waived by the Board); Rex Sys, Inc., ASBCA No. 50456, 98-2 BCA ¶ 29,956 (refusing to dismiss a contractor's appeal simply because the contractor failed to send a copy of the NOA to the contracting officer).

2. Filing an appeal with the contracting officer can satisfy the Board's notice requirement. See Hellenic Express, ASBCA No. 47129, 94-3 BCA ¶ 27,189 (citing Yankee Telecomm. Lab., ASBCA No. 25240, 82-2 BCA ¶ 15,515, for the proposition that "filing an appeal with the contracting officer is tantamount to filing with the Board"); cf. Brunner Bau GmbH, ASBCA No. 35678, 89-1 BCA ¶ 21,315 (holding that notice to the government counsel was a filing).

3. Methods of filing.

   a. Mail. The written NOA can be sent to the ASBCA or to the contracting officer via the U.S. Postal Service. See Thompson Aerospace, Inc., ASBCA Nos. 51548, 51904, 99-1 BCA ¶ 30,232 (NOA mailed to KO timely filed).

   b. Otherwise furnishing, such as through commercial courier service. North Coast Remfg., Inc., ASBCA No. 38599, 89-3 BCA ¶ 22,232 (NOA delivered by Federal Express courier service not accorded same status as U.S. mail service and was therefore untimely).

4. Contents. An adequate notice of appeal must:

   a. Be in writing. See Lows Enter., ASBCA No. 51585, 00-1 BCA ¶ 30,622 (holding that verbal notice is insufficient).

   b. Express dissatisfaction with the contracting officer's decision;

   c. Manifest an intent to appeal the decision to a higher authority, see e.g., McNamara-Lunz Vans & Warehouse, Inc., ASBCA No. 38057, 89-2 BCA ¶ 21,636 (concluding that a letter stating that "we will appeal your decision through the various avenues open to us" adequately expressed the contractor's intent to appeal); cf. Stewart-Thomas Indus., Inc., ASBCA No. 38773, 90-1 BCA ¶ 22,481 (stating that the intent to appeal to the board must be unequivocal); Birken Mfg. Co., ASBCA No. 37064, 89-1 BCA ¶ 21,248 (concluding that an electronic message to the termination contracting officer did not express a clear intent to appeal); and

d. Be timely. 41 U.S.C. § 7104; ASBCA Rule 1(a); Thompson Aerospace, Inc., ASBCA Nos. 51548, 51904, 99-1 BCA ¶ 30,232.

(1) A contractor must file an appeal with a BCA within 90 days of the date it received the contracting officer's final decision. 41 U.S.C. § 7104.

(2) In computing the time taken to appeal (See ASBCA Rule 33(b)):

(a) Exclude the day the contractor received the contracting officer's final decision; and

(b) Count the day the contractor mailed (evidenced by postmark by U.S. Postal Service) the NOA or that the Board received the NOA.

(c) If the 90th day is a Saturday, Sunday, or legal holiday, the appeals period shall run to the end of the next business day.

e. The NOA should also:

(1) Identify the contract, the department or agency involved in the dispute, the decision from which the contractor is appealing, and the amount in dispute; and

(2) Be signed by the contractor taking the appeal or the contractor's duly authorized representative or attorney.

5. The Board liberally construes appeal notices. See Thompson Aerospace, Inc., ASBCA Nos. 51548, 51904, 99-1 BCA ¶ 30,232 (Board jurisdiction where timely mailing of NOA to KO, despite Board rejecting its NOA mailing).

F. Regular Appeals.

1. Docketing. ASBCA Rule 3. The Recorder assigns a docket number and notifies the parties in writing.

2. Rule 4 (R4) File. ASBCA Rule 4.

a. The contracting officer must assemble and transmit an appeal file to the ASBCA and the appellant within 30 days of the date the government receives the docketing notice.

b. The R4 file should contain the relevant documents (e.g., the final decision, the contract, and the pertinent correspondence).

c. The appellant may supplement the R4 file within 30 days of the date it receives its copy.[17]

3. Complaint. ASBCA Rule 6(a).

a. The appellant must file a complaint within 30 days of the date it receives the docketing notice. But cf. Northrop Grumman Corp., DOT BCA No. 4041, 99-1 BCA ¶ 30,191 (requiring the government to file the complaint on a government claim).

b. The board does not require a particular format; however, the complaint should set forth:

(1) Simple, concise, and direct statements of the appellant's claims;

(2) The basis of each claim; and

(3) The amount of each claim, if known.

c. If sufficiently detailed, the board may treat the NOA as the complaint.

4. Answer. ASBCA Rule 6(b).

a. The government must answer the complaint within 30 days of the date it receives the complaint.

b. The answer should set forth simple, concise, and direct statements of the government's defenses to each of the appellant's claims, including any affirmative defenses.

c. The board will enter a general denial on the government's behalf if the government fails to file its answer in a timely manner.

5. Discovery. ASBCA Rules 14-15.

a. The parties may begin discovery as soon as the appellant files the complaint.

b. The board encourages the parties to engage in voluntary discovery.

c. Discovery may include depositions, interrogatories, requests for the production of documents, and requests for admission.

[17] As a practical matter, the ASBCA generally allows either party to supplement the R4 file up to the date of the hearing.

6. Pre-Hearing Conferences. ASBCA Rule 10. The board may hold telephonic pre-hearing conferences to discuss matters that will facilitate the processing and disposition of the appeal.

7. Motions. ASBCA Rule 5.

   a. Parties must file jurisdictional motions promptly; however, the board may defer its ruling until the hearing.

   b. Parties may also file appropriate non-jurisdictional motions.

8. Record Submissions. ASBCA Rule 11.

   a. Either party may waive its right to a hearing and submit its case on the written record.

   b. The parties may supplement the record with affidavits, depositions, admissions, and stipulations when they choose to submit their case on the written record. See Solar Foam Insulation, ASBCA No. 46921, 94-2 BCA ¶ 26,901.

9. Hearings. ASBCA Rules 17-25.

   a. The board will schedule the hearing and choose the location.

   b. Hearings are relatively informal; however, the board generally adheres to the Federal Rules of Evidence.

   c. Both parties may offer evidence in the form of testimony and exhibits.

   d. Witnesses generally testify under oath and are subject to cross-examination.

   e. The board may subpoena witnesses and documents.

   f. A court reporter will prepare a verbatim transcript of the proceedings.

10. Briefs. ASBCA Rule 23. The parties may file post-hearing briefs after they receive the transcript and/or the record is closed.

11. Decisions. ASBCA Rule 28.

   a. The ASBCA issues written decisions.

   b. The presiding judge normally drafts the decision; however, three judges decide the case.

12. Motions for Reconsideration. ASBCA Rule 29.

a. Either party may file a motion for reconsideration within 30 days of the date it receives the board's decision.

b. Motions filed after 30 days are untimely. Bio-temp Scientific, Inc., ASBCA No. 41388, 95-2 BCA ¶ 86,242; Arctic Corner, Inc., ASBCA No. 33347, 92-2 BCA ¶ 24,874.

c. Absent unusual circumstances, a party may not use a motion for reconsideration to correct errors in its initial presentation. Metric Constructors, Inc., ASBCA No. 46279, 94-2 BCA ¶ 26,827.

13. Appeals.41 U.S.C. § 7107. Either party may appeal to the Court of Appeals for the Federal Circuit (CAFC) within 120 days of the date it receives the board's decision; however, the government needs the consent of the U.S. Attorney General. 41 U.S.C. § 7107(a)(1)(B).

G. Accelerated Appeals. 41 U.S.C. § 7106; ASBCA Rule 12.3.

1. If the amount in dispute is $100,000 or less, the contractor may choose to proceed under the board's accelerated procedures.

2. The board renders its decision, whenever possible, within 180 days from the date it receives the contractor's election; therefore, the board encourages the parties to limit (or waive) pleadings, discovery, and briefs.

3. The presiding judge normally issues the decision with the concurrence of a vice chairman. If these two individuals disagree, the chairman will cast the deciding vote.

a. Written decisions normally contain only summary findings of fact and conclusions.

b. If the parties agree, the presiding judge may issue an oral decision at the hearing and follow-up with a memorandum to formalize the decision.

4. Either party may appeal to the CAFC within 120 days of the date it receives the decision.

H. Expedited Appeals. 41 U.S.C. § 7106; ASBCA Rule 12.

1. If the amount in dispute is $50,000 or less or where the business (as defined in the Small Business Act and regulations under that Act), $150,000 or less, the contractor may choose to proceed under the board's expedited procedures.

2. The board renders its decision, whenever possible, within 120 days from the date it receives the contractor's election; therefore, the board uses very

streamlined procedures (e.g., accelerated pleadings, extremely limited discovery, etc.).

3. The presiding judge decides the appeal.

   a. Written decisions contain only summary finds of fact and conclusions.

   b. The presiding judge may issue an oral decision from the bench and follow-up with a memorandum to formalize the decision.

4. Neither party may appeal the decision, and the decision has no precedential value. See Palmer v. Barram, 184 F.3d 1373 (Fed. Cir. 1999) (holding that a small claims decision is only appealable for fraud in the proceedings).

I. Remedies.

1. The board may grant any relief available to a litigant asserting a contract claim in the COFC. 41 U.S.C. § 7105(e)(2).

   a. Money damages is the principal remedy sought.

   b. The board may issue a declaratory judgment. See Malone v. United States, 849 F.2d 1441 (Fed. Cir. 1988) (validity of T4D).

   c. The board may award attorney's fees pursuant to the Equal Access to Justice Act (EAJA). 5 U.S.C. § 504. See Hughes Moving & Storage, Inc., ASBCA No. 45346, 00-1 BCA ¶ 30,776 (award decision in T4D case); Oneida Constr., Inc., ASBCA No. 44194, 95-2 BCA ¶ 27,893 (holding that the contractor's rejection of the agency settlement offer, which was more than the amount the board subsequently awarded, did not preclude recovery under the EAJA); cf. Cape Tool & Die, Inc., ASBCA No. 46433, 95-1 BCA ¶ 27,465 (finding rates in excess of the $75 per hour guideline rate reasonable for attorneys in the Washington D.C. area with government contracts expertise). Q.R. Sys. North, Inc., ASBCA No. 39618, 96-1 BCA ¶ 27,943 (rejecting the contractor's attempt to transfer corporate assets so as to fall within the EAJA ceiling).

2. The board need not find a remedy-granting clause to grant relief. See S&W Tire Serv., Inc., GSBCA No. 6376, 82-2 BCA ¶ 16,048 (awarding anticipatory profits).

3. The board may not grant specific performance or injunctive relief. General Elec. Automated Sys. Div., ASBCA No. 36214, 89-1 BCA ¶ 21,195. See Western Aviation Maint., Inc. v. General Services Admin, GSBCA No. 14165, 98-2 BCA ¶ 29,816 (holding that the 1992 Tucker Act amendments did not waive the government's immunity from specific

performance suits).

J. Payment of Judgments. 41 U.S.C. § 7108.

1. An agency may access the "Judgment Fund" to pay "[a]ny judgment against the United States on a [CDA] claim." 41 U.S.C. § 7108(a). See 31 U.S.C. § 1304; cf. 28 U.S.C. § 2517.

a. The Judgment Fund is only available to pay judgments and monetary awards—it is not available to pay informal settlement agreements. See 41 U.S.C. § 7108; see also 31 U.S.C. § 1304.

b. If an agency lacks sufficient funds to cover an informal settlement agreement, it can "consent" to the entry of a judgment against it. See Bath Irons Works Corp. v. United States, 20 F.3d 1567, 1583 (Fed. Cir. 1994); Casson Constr. Co., GSBCA No. 7276, 84-1 BCA ¶ 17,010 (1983). As a matter of policy, however, it behooves the buying activity to coordinate with its higher headquarters regarding the use of consent decrees since the agency must reimburse the Judgment Fund with current funds.

2. Prior to payment, both parties must certify that the judgment is "final" (i.e., that the parties will pursue no further review). 31 U.S.C. § 1304(a). See Inland Servs. Corp., B-199470, 60 Comp. Gen. 573 (1981).

3. An agency must repay the Judgment Fund from appropriations current at the time of the award or judgment. 41 U.S.C. § 7108(c). Bureau of Land Management, B-211229, 63 Comp. Gen. 308 (1984).

K. Appealing an Adverse Decision. 41 U.S.C. § 7107. Board decisions are final unless one of the parties appeals to the CAFC within 120 days after the date the party receives the board's decision. See Placeway Constr. Corp. v. United States, 713 F.2d 726 (Fed. Cir. 1983).

VIII. ACTIONS BEFORE THE COURT OF FEDERAL CLAIMS (COFC).

A. The right to file suit. Subsequent to receipt of a contracting officer's final decision, a contractor may bring an action directly on the claim in the COFC. 41 U.S.C. § 7104(b).

B. The Court of Federal Claims (COFC).

1. Over a third of the court's workload concerns contract claims.

2. The President appoints COFC judges for a 15-year term with the advice and consent of the Senate.

3. The President can reappoint a judge after the initial 15-year term expires.

4. The Federal Circuit can remove a judge for incompetency, misconduct, neglect of duty, engaging in the practice of law, or physical or mental disability.

5. The Rules of the United States Court of Federal Claims (RCFC) appear in an appendix to Title 28 of the United States Code.

C. Jurisdiction.

1. The Tucker Act. 28 U.S.C. § 1491(a)(1). The COFC has jurisdiction to decide claims against the United States based on:

a. The Constitution;

b. An act of Congress;

c. An executive regulation; or

d. An express or implied-in-fact contract.

2. The Contract Disputes Act (CDA) of 1978. 41 U.S.C. § 7104(b). The Court has jurisdiction to decide appeals from contracting officers' final decisions.

3. The Federal Courts Administration Act of 1992, Pub. L. No. 102-572, 106 Stat. 4506 (codified at 28 U.S.C. § 1491(a)(2)). The COFC has jurisdiction to decide nonmonetary claims (e.g., disputes regarding contract terminations, rights in tangible or intangible property, and compliance with cost accounting standards) that arise under section 10(a)(1) of the CDA.

D. Standard of Review. 41 U.S.C. § 7104(b)(4). The COFC will review the case de novo. The COFC will not presume that the contracting officer's findings of fact and conclusions of law are valid. Instead, the COFC will treat the contracting officer's final decision as one more piece of documentary evidence and weigh it with all of the other evidence in the record. Wilner v. United States, 24 F.3d 1397 (Fed. Cir. 1994) (en banc) (overruling previous case law that a contracting officer's final decision constitutes a "strong presumption or an evidentiary admission" of the government's liability).

E. Perfecting an Appeal.

1. Timeliness. 41 U.S.C. § 7104(b)(3); RCFCs 3 and 6.

a. A contractor must file its complaint within 12 months of the date it received the contracting officer's final decision. See Janicki Logging Co. v. United States, 124 F.3d 226 (Fed. Cir. 1997)

(unpub.); K&S Constr. v. United States, 35 Fed. Cl. 270 (1996); see also White Buffalo Constr., Inc. v. United States, 28 Fed. Cl. 145 (1992) (filing one day after the expiration of the 12 month period rendered it untimely).

b. In computing the appeals period, exclude:

(1) The day the contractor received the contracting officer's decision; and

(2) The last day of the appeals period if that day is:

(a) A Saturday, Sunday, or federal holiday; or

(b) A day on which weather or other conditions made the Clerk of Court's office inaccessible.

c. The COFC may deem a late complaint timely if:

(1) The plaintiff sent the properly addressed complaint by registered or certified mail, return receipt requested;

(2) The plaintiff deposited the complaint in the mail sufficiently in advance of the due date to permit its timely receipt in the ordinary course of the mail; and

(3) The plaintiff exercised no control over the complaint from the time of mailing to the time of delivery.

See B. D. Click Co. v. United States, 1 Cl. Ct. 239 (1982) (concluding that the contractor failed to demonstrate the applicability of the exception to the timeliness rules).

d. The Fulford Doctrine. See para. VI.F.3, above.

2. Filing Method. RCFC 3. The contractor must deliver its complaint to the Clerk of Court.

3. Contents. RCFC 8(a); RCFC 9(h).

a. If the complaint sets forth a claim for relief, the complaint must contain:

(1) A "short and plain" statement regarding the COFC's jurisdiction;

(2) A "short and plain" statement showing that the plaintiff is entitled to relief; and

(3) A demand for a judgment.

b. In addition, the complaint must contain, inter alia:

(1) A statement regarding any action taken on the claim by Congress, a department or agency of the United States, or another tribunal;

(2) A clear citation to any statute, regulation, or executive order upon which the claim is founded; and

(3) A description of any contract upon which the claim is founded.

4. The Election Doctrine. See para. II.B.3, above.

F. Procedures.

1. Process. RCFC 4. The Clerk of Court serves 5 copies of the complaint on the Attorney General (or the Attorney General's designated agent).

2. "Call Letter." 28 U.S.C. § 520.

a. The Attorney General must send a copy of the complaint to the responsible military department.

b. In response, the responsible military department must provide the Attorney General with a "written statement of all facts, information, and proofs."

3. Answer. RCFCs 8, 12, and 13. The government must answer the complaint within 60 days of the date it receives the complaint.

4. The court rules regulate discovery and pretrial procedures extensively, and the court may impose monetary sanctions for noncompliance with its discovery orders. See M. A. Mortenson Co. v. United States, 996 F.2d 1177 (Fed. Cir. 1993).

5. Decisions may result from either a motion or a trial. Procedures generally mirror those of trials without juries before federal district courts. The judges make written findings of fact and state conclusions of law.

G. Remedies.

1. The COFC has jurisdiction "to afford complete relief on any contract claim brought before the contract is awarded including declaratory judgments, and such equitable and extraordinary relief as it deems proper." Federal Courts Improvements Act of 1982, Pub. L. No. 97-164,

96 Stat. 40 (codified at 28 U.S.C. § 1491(a)(3)). See Sharman Co., Inc. v. United States, 2 F.3d 1564 (Fed. Cir. 1993).

2. The COFC has no authority to issue injunctive relief or specific performance, except for reformation in aid of a monetary judgment, or rescission instead of monetary damages. See John C. Grimberg Co. v. United States, 702 F.2d 1362 (Fed. Cir. 1983); Rig Masters, Inc. v. United States, 42 Fed. Cl. 369 (1998); Paragon Energy Corp. v. United States, 645 F.2d 966 (Ct. Cl. 1981).

3. The COFC may award EAJA attorneys' fees. 28 U.S.C. § 2412.

H. Payment of Judgments. See para. VII.J., above.

I. Appealing an Adverse Decision.

1. Unless timely appealed, a final judgment bars any further claim, suit, or demand against the United States arising out of the matters involved in the case or controversy. 28 U.S.C. § 2519.

2. A party must appeal a final judgment to the CAFC within 60 days of the date the party receives the adverse decision. 28 U.S.C. § 2522. See RCFC 72.

IX. APPEALS TO THE COURT OF APPEALS FOR THE FEDERAL CIRCUIT (CAFC).

A. National Jurisdiction.

1. The Federal Circuit has national jurisdiction. Dewey Elec. Corp. v. United States, 803 F.2d 650 (Fed. Cir. 1986); Teller Envtl. Sys., Inc. v. United States, 802 F.2d 1385 (Fed. Cir. 1986).

2. The Federal Circuit also exclusive jurisdiction over appeals from an agency BCA and the COFC pursuant to section 8(g)(1) of the CDA. 28 U.S.C. § 1295(a)(3) and (10).

B. Standard of Review. 41 U.S.C. § 7104(b)(4).

1. Jurisdiction. The court views jurisdictional challenges as "pure issues of law," which it reviews de novo. See Transamerica Ins. Corp. v. United States, 973 F.2d 1572, 1576 (Fed. Cir. 1992).

2. Findings of Fact. Findings of fact are final and conclusive unless they are fraudulent, arbitrary, capricious, made in bad faith, or not supported by substantial evidence. 49 U.S.C. § 609(b). See United States v. General Elec. Corp., 727 F.2d 1567, 1572 (Fed. Cir. 1984) (holding that the court will affirm a board's decision if there is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion");

Tecom, Inc. v. United States, 732 F.2d 935, 938 n.4 (Fed. Cir. 1995) (finding that the trier of fact's credibility determinations are virtually unreviewable).

C. Frivolous Appeals. The court will assess damages against parties filing frivolous appeals. See Dungaree Realty, Inc. v. United States, 30 F.3d 122 (Fed. Cir. 1994); Wright v. United States, 728 F.2d 1459 (Fed. Cir. 1984).

D. Supreme Court Review. The U.S. Supreme Court reviews decisions of the Federal Circuit by writ of certiorari.

X. CONTRACT ATTORNEY RESPONSIBILITIES IN THE DISPUTES PROCESS.

A. Actions upon Receipt of a Claim.

1. Review the claim and check the agency's facts and theories.

2. Verify that the contractor has properly certified all claims exceeding $100,000.

3. Advise the contracting officer to consider business judgment factors, as well as legal issues.

B. Contracting Officer's Final Decision.

1. Prior to reviewing the final decision, determine whether the claim should be certified. If the claim exceeds $100,000, ensure that a person authorized to bind the contractor properly certified the claim.

2. Ensure that the subject of the final decision is a nonroutine request for payment, rather than a contractor's invoice or preliminary request for adjustment.

3. Review the final decision for sufficiency of factual and legal reasoning.

4. Ensure that the decision letter properly sets forth the contractor's appeal rights.

C. R4 File.

1. Oversee the preparation of the Rule 4 file. If possible, coordinate with the trial counsel assigned to the appeal as to what documents to include/omit from the Rule 4 file.

2. Put privileged documents in a separate litigation file for transmission to the trial attorney.

D. Discovery.

1. Assist the trial attorney in formulating a discovery plan.

2. Identify knowledgeable government and contractor personnel and conduct preliminary interviews of government witnesses.

3. Draft interrogatories, requests for documents, requests for admissions, and other discovery requests. Prepare draft responses to any discovery requests propounded by the appellant.

4. Assist the trial counsel during depositions (e.g., by identifying key contractor personnel and pertinent documents related to the dispute). Coordinate with the trial counsel regarding the feasibility of conducting one or more depositions.

E. Hearings.

1. Through the trial attorney, coordinate with the Chief Trial Attorney concerning appearing as counsel of record.

2. To the extent practicable, assist in witness and evidence preparation.

3. Assist in the preparation and/or review of post-hearing briefs.

F. Client Expectations. Assist the trial attorney in providing the contracting officer and other interested parties regular status updates regarding the appeal.

G. Settlement. Work with the contracting officer and the trial attorney regarding the costs and benefits of litigating the claim. Strive for a position that reflects sound business judgment and protects the interests of the government.

XI. CONCLUSION.

ATTACHMENT A

52.233-1 Disputes.

As prescribed in 33.215, insert the following clause:

Disputes (May 2014)

(a) This contract is subject to 41 U.S.C. chapter 71, Contract Disputes.

(b) Except as provided in 41 U.S.C. chapter 71, all disputes arising under or relating to this contract shall be resolved under this clause.

(c) "Claim," as used in this clause, means a written demand or written assertion by one of the contracting parties seeking, as a matter of right, the payment of money in a sum certain, the adjustment or interpretation of contract terms, or other relief arising under or relating to this contract. However, a written demand or written assertion by the Contractor seeking the payment of money exceeding $100,000 is not a claim under 41 U.S.C. chapter 71 until certified. A voucher, invoice, or other routine request for payment that is not in dispute when submitted is not a claim under 41 U.S.C. chapter 71. The submission may be converted to a claim under 41 U.S.C. chapter 71, by complying with the submission and certification requirements of this clause, if it is disputed either as to liability or amount or is not acted upon in a reasonable time.

(d)

(1) A claim by the Contractor shall be made in writing and, unless otherwise stated in this contract, submitted within 6 years after accrual of the claim to the Contracting Officer for a written decision. A claim by the Government against the Contractor shall be subject to a written decision by the Contracting Officer.

(2)

(i) The contractor shall provide the certification specified in paragraph (d)(2)(iii) of this clause when submitting any claim exceeding $100,000.

(ii) The certification requirement does not apply to issues in controversy that have not been submitted as all or part of a claim.

(iii) The certification shall state as follows: "I certify that the claim is made in good faith; that the supporting data are accurate and complete to the best of my knowledge and belief; that the amount requested accurately reflects the contract adjustment for which the Contractor believes the Government is liable; and that I am authorized to certify the claim on behalf of the Contractor."

(3) The certification may be executed by any person authorized to bind the Contractor with respect to the claim.

(e) For Contractor claims of $100,000 or less, the Contracting Officer must, if requested in writing by the Contractor, render a decision within 60 days of the request. For Contractor-certified claims over $100,000, the Contracting Officer must, within 60 days, decide the claim or notify the Contractor of the date by which the decision will be made.

(f) The Contracting Officer's decision shall be final unless the Contractor appeals or files a suit as provided in 41 U.S.C. chapter 71.

(g) If the claim by the Contractor is submitted to the Contracting Officer or a claim by the Government is presented to the Contractor, the parties, by mutual consent, may agree to use alternative dispute resolution (ADR). If the Contractor refuses an offer for ADR, the Contractor shall inform the Contracting Officer, in writing, of the Contractor's specific reasons for rejecting the offer.

(h) The Government shall pay interest on the amount found due and unpaid from

(1) the date that the Contracting Officer receives the claim (certified, if required); or

(2) the date that payment otherwise would be due, if that date is later, until the date of payment.

With regard to claims having defective certifications, as defined in FAR 33.201, interest shall be paid from the date that the Contracting Officer initially receives the claim. Simple interest on claims shall be paid at the rate, fixed by the Secretary of the Treasury as provided in the Act, which is applicable to the period during which the Contracting Officer receives the claim and then at the rate applicable for each 6-month period as fixed by the Treasury Secretary during the pendency of the claim.

(i) The Contractor shall proceed diligently with performance of this contract, pending final resolution of any request for relief, claim, appeal, or action arising under the contract, and comply with any decision of the Contracting Officer.

(End of Clause)

Alternate I (Dec 1991). As prescribed in 33.215, substitute the following paragraph (i) for the paragraph (i) of the basic clause:

(i) The Contractor shall proceed diligently with performance of this contract, pending final resolution of any request for relief, claim, appeal, or action arising under or relating to the contract, and comply with any decision of the Contracting Officer.